Supreme Court, U.S.
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No. 92-1610

# In the Supreme Court of the United States

OCTOBER TERM, 1992

FRANK LONGO, PETITIONER

*v.*

UNITED STATES POSTAL SERVICE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether a United States Postal Service regulation, 39 C.F.R. 232.1(h)(1), that prohibits "campaigning for election to any public office" on Postal Service property violates the First Amendment to the United States Constitution.

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### OPINIONS BELOW

The January 13, 1992, opinion of the court of appeals (Pet. App. 15A-30A) is reported at 953 F.2d 790. The order of this Court vacating the Second Circuit's January 13, 1992, judgment and remanding the case to the court of appeals for further consideration is set forth at Pet. App. 12A. The December 28, 1992, opinion of the court of appeals on remand (Pet. App. 1A-11A) is reported at 983 F.2d 9. The opinion of the district court (Pet. App. 33A-79A) is reported at 761 F. Supp. 220.

### JURISDICTION

The judgment of the court of appeals was entered on December 28, 1992. The petition for a writ of

certiorari was filed on March 29, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1988, petitioner attempted to run for the United States Senate as an independent candidate from Connecticut. Pet. App. 17A. In order to qualify for a place on the ballot, he was required to collect approximately 9,800 signatures on petitions. On May 25, 1988, petitioner set up a table and chair on the off-street access walkway adjacent to the entrance to the Torrington, Connecticut, Post Office to solicit signatures in support of his candidacy. *Ibid.*

The Torrington Post Office is located on property owned by the United States Postal Service. Pet. App. 36A-37A. The off-street access walkway is a concrete apron surrounding the post office building. It is located entirely on Postal Service property, and it is adjacent to and leads to the entrance of the post office building. It is separated from the municipal sidewalks and streets by a parking lot, driving lanes, and garage space for Postal Service vehicles. *Id.* at 37A. The walkway provides the only means by which customers of the post office can travel from the parking lot to the post office building. *Ibid.*

The Torrington postmaster informed petitioner that his actions violated a Postal Service regulation, 39 C.F.R. 232.1(h)(1), that prohibits "campaigning for election to any public office" on Postal Service property. Pet. App. 17A-18A. The postmaster showed petitioner a copy of the regulation and asked him to leave, but petitioner refused. *Id.* at 18A. When petitioner continued to ignore the postmaster's requests, he was arrested by the Torrington police and charged

with criminal trespass. On July 13, 1988, the charges against petitioner were dropped in exchange for his promise to cease campaign activities at the post office. *Ibid.* Petitioner nevertheless returned on four separate occasions to solicit signatures, each time setting up a table and chair on the access walkway. Several postal patrons complained that petitioner was abusive when they refused to sign his petition or when they questioned him as to his reasons for using Postal Service property. *Ibid.*

2. On August 12, 1988, petitioner filed this action in federal district court seeking declaratory and injunctive relief. Pet. App. 18A. Petitioner alleged that the postal regulation codified at 39 C.F.R. 232.1 (h)(1) was invalid, both facially and as applied, under the First Amendment to the United States Constitution. Pet. App. 18A. In April 1991, the district court granted summary judgment in petitioner's favor. *Id.* at 31A-32A. It held that the off-street access walkway was not a public forum, *id.* at 52A-63A, but that the challenged regulation nevertheless violated the First Amendment because it was content-based and underinclusive. *Id.* at 63A-79A.

3. The court of appeals reversed. Pet. App. 15A-30A. The court declined to determine the walkway's status as a forum for First Amendment purposes. Instead, it found that the postal regulation at issue was a reasonable time, place, and manner restriction that could survive scrutiny even in a traditional public forum. *Id.* at 22a-29a.

4. On October 5, 1992, this Court vacated the judgment of the court of appeals and remanded the case for further consideration in light of *Burson* v. *Freeman*, 112 S. Ct. 1846 (1992). Pet. App. 12A.

In *Burson*, the Court found that a Tennessee statute prohibiting solicitation of votes within 100 feet of the entrance to a polling place was a "content-based" restriction in a public forum. The Court nevertheless upheld the restriction as necessary to serve compelling state interests. 112 S. Ct. at 1855. On remand, the court of appeals again reversed the judgment of the district court. The court acknowledged that the restriction on campaigning for public office would appear to qualify as a "content-based" restriction under *Burson*, and declined to hold that the regulation served "a compelling state interest." Pet. App. 5A-6A. The court nevertheless upheld the regulation. Relying on the reasoning of a plurality of the Court in *United States* v. *Kokinda*, 497 U.S. 720 (1990), the court of appeals determined that the postal walkway at issue—which, like the walkway in *Kokinda* was designed solely to provide access to the post office for individuals engaged in postal business—was not a public forum for the purpose of expressive activity. Pet. App. 7A. The court stated that, "[u]pon a finding that an area is a nonpublic forum, the only requirement of the regulation is that it be reasonable and not an effort to suppress a speaker['s] [viewpoint]." *Id.* at 9A. The court reiterated its previous finding that the regulation served a "*significant* state interest in precluding postal workers from political entanglement." *Id.* at 10A (emphasis in original). It thus concluded that the regulation met the "lesser requirement of reasonableness." *Ibid.*

## ARGUMENT

1. a. Petitioner argues that the Court should review this case to "provide authoritative guidance" concerning the "forum status" of an off-street postal walkway—that is, whether such a walkway is a traditional or designated public forum for free speech activities, or a nonpublic forum. Pet. 21-22; *id.* at 10-11. There is, however, no conflict among the courts of appeals concerning the forum status of off-street postal walkways such as the one at issue here. Although the Fourth Circuit had held in *Kokinda*, in the course of striking down a regulation prohibiting solicitation on postal property, that a similar off-street walkway was a traditional public forum for First Amendment purposes, that decision was reversed by this Court. 497 U.S. 720 (1990). To be sure, no one view of the forum status of the postal walkway in *Kokinda* garnered the support of a majority of Justices. However, the Court did reverse the only decision in which a court of appeals had held that this type of off-street postal walkway is a traditional public forum, and there is currently no authority in the courts of appeals for that proposition. Indeed, other than the Fourth Circuit in *Kokinda*, no court of appeals has ever struck down Postal Service restrictions on expressive activity on Postal Service property, whether on the ground that the property at issue was a public forum or on any other basis. See *Monterey County Democratic Cent. Comm.* v. *United States Postal Service*, 812 F.2d 1194 (9th Cir. 1987); *United States* v. *Belsky*, 799 F.2d 1485 (11th Cir. 1986); *United States* v. *Bjerke*, 796 F.2d 643 (3d Cir. 1986); *American Postal Workers Union* v. *United States Postal Service*, 764 F.2d 858 (D.C.

Cir. 1985), cert. denied, 474 U.S. 1055 (1986); *National Anti-Drug Coalition, Inc.* v. *Bolger*, 737 F.2d 717 (7th Cir. 1984); *Jacobsen* v. *United States Postal Service*, No. 89-16054 (9th Cir. Apr. 30, 1993).

b. The court of appeals was correct in holding that the postal walkway at issue is not a public forum. See Pet. App. 7A-8A. As the government argued before this Court in *Kokinda*, see Gov't Br. 16-42, an off-street postal walkway with the characteristics of the one at issue here does not qualify as a traditional public forum under accepted principles of forum analysis. The walkway is not a public thoroughfare; it was "constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." *Kokinda*, 497 U.S. at 728 (plurality opinion). Moreover, contrary to petitioner's suggestion (Pet. 22-27), the court's identification of the postal walkway as a nonpublic forum is fully consistent with more recent decisions of this Court. In *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 112 S. Ct. 2701 (1992), this Court emphasized that the history of the airport terminal that was at issue in that case revealed that the government had not consistently made it available, nor had it been used by the public, for the free exchange of ideas. 112 S. Ct. at 2706-2707. Likewise, in the instant action, off-street post office walkways have not historically been thrown open to the public for the full range of First Amendment activities. See *United States* v. *Kokinda*, 497 U.S. at 727-747. Thus, the walkways do not have the characteristics of a traditional public forum.

Petitioner is mistaken in suggesting (Pet. 14-17) that the Postal Service has created a designated pub-

lic forum because, while it expressly forbids certain categories of speech,[1] individuals or groups have been permitted to leaflet, speak, and picket on postal premises. Even petitioner acknowledges (Pet. 15), however, that "a practice of allowing some speech activities on postal property do[es] not add up to the dedication of postal property to speech activity," *Kokinda*, 497 U.S. at 730 (plurality opinion). As this Court stated in *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985), the "government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." See also *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) ("selective access does not transform government property into a public forum"). There has been no intentional designation here: As the plurality in *Kokinda* observed, 497 U.S. at 730, "[n]o postal service regulation opens postal sidewalks to any First Amendment activity" by the public.[2] Thus, the regulations make clear that the

[1] Aside from prohibiting campaigning for public office, the regulation forbids "[s]oliciting * * * contributions, * * * collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises." 39 C.F.R. 232.1(h)(1). See *Kokinda*, 497 U.S. at 724 (plurality opinion). The Postal Service is also authorized to prohibit other activities that "impede[] or disturb[] the general public in transacting business or obtaining the services provided on [postal] property." 39 C.F.R. 232.1(e).

[2] The regulations permit certain non-employees to engage in narrow categories of expression that are closely related to the mission of the Service and its character as a federal

postal walkway has not been made into a forum on which members of the public are invited to campaign for public office.

c. There is no need for this Court to hold this petition pending its decision in *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 959 F.2d 381 (2d Cir.), cert. granted, 113 S. Ct. 51 (1992). See Pet. 22 n.10. Petitioner concedes (Pet. 13) that the issue he urges the Court to decide—whether, with respect to the premises in question, "the government has created a designated forum in the first place"—is "not presented" in *Lamb's Chapel*. Petitioner acknowledges that the school property to which petitioner's religious organization sought access in *Lamb's Chapel* had been "designated" by the government for speech-related activities, because school district regulations implementing state law had expressly made the property available to a wide range of groups for that purpose. See Pet. 13 n.3. The issue in *Lamb's Chapel* thus is not whether school property was "designated" for the exercise of First Amendment rights, but whether religious groups could selectively be excluded from the forum. See 959 F.2d at 387-389. For that reason, the decision in *Lamb's Chapel* is unlikely to have any bearing on the threshold question petitioner wishes this Court to address—whether the off-street postal walkway qualifies as a designated forum in the absence of a postal regulation that explicitly "opens postal side-

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entity, including "[c]ommercial activities performed under contract with the Postal Service," and "solicitation of Postal Service * * * personnel for contributions" to a federally sponsored charity drive. 39 C.F.R. 232.1(h)(1)(i), (ii), and (iii).

walks to * * * First Amendment activity." *Kokinda*, 497 U.S. at 730.

3. Finally, relying principally on the Court's opinion in *International Soc'y for Krishna Consciousness* v. *Lee*, 112 S. Ct. 2701 (1992), petitioner claims (Pet. 28-29) that, even if the Torrington Post Office walkway is a nonpublic forum, the court of appeals erred in finding that it was reasonable to forbid campaigning for public office on the premises. Petitioner's reliance on *Lee* is misplaced.

In that case, in finding a rule banning solicitation in an airport terminal to be reasonable, the Court observed that solicitation was permitted on outdoor terminal sidewalks that were frequented by most of the terminal passengers. That observation does not undermine the reasonableness of the regulation at issue here. Although the Court in *Lee* suggested that the fact that an interminal ban on solicitation would have a minimal effect on the speaker's access to its targeted audience contributed to the reasonableness of the restriction, it did not suggest that a restriction on speech was per se unreasonable unless an equivalent opportunity to reach the same audience was available nearby. Indeed, the Court has stated elsewhere that, to satisfy a test of reasonableness, a limitation on speech in a nonpublic forum "need not be the least restrictive or least intrusive" that can be devised. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989). Rather, it is sufficient that the limitation "promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799.

In this case, the Second Circuit previously decided, in the context of a time, place, and manner analysis (see Pet. App. 22A-25A), that the anti-campaigning

regulation was a reasonable means of advancing the important Postal Service interests in avoiding an appearance of improper political involvement and relieving its employees of the burden of overseeing on-premises campaigning. *Id.* at 22A-24A.[3] In *Kokinda*, the Court recognized that even non-partisan solicitation could distract postal personnel from their main task of delivering the mail by requiring them to "field[] competing demands for space and administer[] a program of permits and approvals." 497 U.S. at 735 (plurality opinion). See also *id* at 739 (Kennedy, J. concurring in the judgment) ("the Government here has a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions"). In sum, the challenged regulation represents a reasonable means of advancing valid purposes, and is therefore a permissible restriction on speech in a nonpublic forum.[4]

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[3] Petitioner notes (see Pet. 30-31) that, although postal regulations forbid campaigning for public office, they are silent concerning expression on partisan political issues. However, the Postal Service could reasonably decide that the possibility of appearing to favor political candidates posed a greater threat to the Postal Service's professionalism and image of impartiality than permitting citizens to express political opinions on the premises.

[4] Petitioner also claims (Pet. 32-36) that the Postal Service's concern that permitting campaigning on the premises might compromise the appearance of political neutrality is not sufficiently "supported by the record." Contrary to petitioner's assertion (Pet. 32), this Court has never held that there must be "conclusive proof of an actual effect" before a government entity may limit speech on its premises. See *Cornelius*, 473 U.S. at 810. On the contrary, "the Government need not wait until havoc is wreaked to restrict access to a

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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nonpublic forum." *Ibid.* See also *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 52 & n.12 (1983) ("exclusion of [a] rival union may reasonably be considered a means of insuring labor peace within the schools"). Petitioner acknowledges that Congress expressed its desire "to put an end to the politicization of the [Postal Service]" and to minimize the evils of political patronage. Pet. 34. Forbidding on-premises campaigning for public office is a reasonable means of advancing those goals, since it ensures that postal employees will not use access to postal premises to curry favor with candidates, and that successful candidates, in turn, will not reward employees for providing special access.

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